Filed 6/28/19 In re B.M. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re B.M. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. I.S., Defendant and Appellant.	E071923 (Super.Ct.Nos. J272025, J272026, J272027, J272028 & J272029) OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Conditionally reversed with directions.

Richard L. Knight, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

In this dependency matter, defendant and appellant I.S. (mother) challenges the termination of her parental rights as to B.M. and I.M., twins born in July 2017.[1] Mother argues that the juvenile court erred by: (1) failing to give her proper notice of her right to seek writ review of orders at the six-month review hearing terminating her reunification services and setting a hearing pursuant to Welfare and Institutions Code section 366.26;[2] (2) failing to issue a transportation order allowing her to be physically present at the section 366.26 hearing even though she was incarcerated; (3) failing to provide her with appointed counsel; (4) finding that the reunification services provided by plaintiff and respondent San Bernardino County Children and Family Services (CFS) were reasonable; and (5) finding that the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) did not apply, in the absence of evidence to support such a finding.

We conditionally remand the matter for compliance with ICWA, but otherwise affirm the judgment.[3]

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[1] Mother's appeal has been dismissed with respect to three older children, whose termination hearing was continued. These three children were approximately four and a half years old, three years old, and 15 months old, respectively, when the twins were born.

[2] Further undesignated statutory references are to the Welfare and Institutions Code.

[3] CFS argues that we should apply the disentitlement doctrine and dismiss mother's appeal without reaching the merits of her arguments. See *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 277 ["A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state."]; *In re Kamelia S.* (2000) 82 Cal.App.4th 1224, 1229 [applying disentitlement doctrine in

I. FACTUAL AND PROCEDURAL BACKGROUND

The twins and their three older siblings came to the attention of CFS in July 2017, shortly after the twins were born, through a referral from medical providers stating that mother had tested positive for THC. After meetings with a social worker, the children's father J.M. (father), who is not party to this appeal, and mother agreed to a safety plan, as part of which (1) mother and father would both drug test, (2) a social worker would visit with the children weekly, and (3) mother would reside with the children's parental grandmother so that they would have additional family support.

Both parents failed to drug test, and they did not respond to the social worker's attempts to schedule visits. The parents also did not take advantage of the voluntary services offered to them, failing to "work with the Parent Partner regarding referrals." On July 24, 2017, the parents were informed by telephone that CFS would be filing dependency petitions with respect to the children and a detention hearing would be held on July 27, 2017. In dependency petitions filed on July 26, 2017, CFS alleged that the five children came within section 300, subdivision (b) [failure to protect], based on the

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dependency context].) We do not find it appropriate to apply the disentitlement doctrine to mother's contention that the juvenile court erred in finding that ICWA did not apply, since ICWA is designed to "protect[] the right of the tribe independent of any rights held by either parent." (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1425.) Further, we find the interests of judicial economy are better served by performing the relatively straightforward analysis necessary to resolve mother's other claims of error on the merits, rather than addressing the closer question of whether she should be disentitled from any relief. We therefore express no opinion on the parties' arguments regarding application of the disentitlement doctrine. CFS's pending request for judicial notice, which is primarily in support of its arguments regarding disentitlement, and which is not otherwise necessary for our resolution of this appeal, is therefore denied.

parents' histories of substance abuse and domestic violence, and within subdivision (j) [abuse of sibling], based on mother's failure to reunify with two older children in a prior dependency.[4] CFS did not immediately detain the children and initially recommended that they remain in the care of their parents on the condition that they continue to reside in the home of their paternal grandmother.

On July 27, 2017, however, the parents failed to appear with the children for the detention hearing. The minors' counsel therefore objected to the CFS recommendation that the children be maintained with their parents. Minors' counsel noted for the record that it was 11:20 a.m., and that the parents had been instructed to be at court with the children by 8:00 a.m. During the hearing, the "court officer" was in contact with mother by telephone—the record does not establish whether mother called in, or if the court officer called mother—and informed her that the matter was being set for a contested hearing on July 31, 2017, and that she, father, and all five children needed to be in court for that hearing.[5]

Mother and father did not appear for the contested detention hearing on July 31, 2017, and also failed again to drug test. The juvenile court indicated that it was "of the same mind" as minors' counsel, that the children should be removed from the parents'

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[4] The two older children, half siblings of the five children at issue in these dependency proceedings, were removed from mother's custody in dependency proceedings in Los Angeles County. The two older children were placed in a legal guardianship with a paternal great-grandmother in 2011.

[5] See *Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1278 [describing court officer as a social worker whose "role included preparing files for hearings, reviewing reports, and acting as liaison between the court and social services"].

care. CFS did not expressly change its previous recommendation that the children be maintained in the parents' home, but its counsel chose to "just submit," rather than argue the matter. The juvenile court found that a prima facie case had been made that the children came within section 300, and ordered them detained out of the care of mother and father. The court ordered the parents to have weekly supervised visitation.

In the jurisdictional/dispositional report filed August 16, 2017, the social worker reported that the children had been placed in several separate foster homes. On August 3, 2017, the social worker had met with mother, father, and a paternal aunt to discuss the dependency and inform them of the jurisdictional/dispositional hearing. The social worker subsequently learned, however, that on July 28, 2017, mother had been arrested for robbery and released on bail; on the same date, a warrant was issued for father's arrest for armed robbery, and he was considered armed and dangerous. The report stated that ICWA did not apply, but did not include evidence demonstrating CFS conducted an ICWA inquiry with the parents and family. The social worker recommended that the juvenile court sustain the allegations of the section 300 petitions, remove the children from the parents, and order family reunification services.

The jurisdictional/dispositional hearing, initially set for August 21, 2017, was continued; the parents were not present, and CFS had not sent formal written notice of the hearing. On September 8, 2017, CFS filed a declaration of due diligence, stating that mother's whereabouts were unknown and describing its efforts to locate her. CFS sent certified mail notice of the jurisdictional/dispositional hearing to 10 possible addresses in five different cities, including mother's last known address at the home of the parental

grandmother. Similar efforts were made to give notice to father, whose whereabouts also remained unknown.

Neither parent appeared for the jurisdictional/dispositional hearing, which was held on September 12, 2017. The juvenile court found notice had been given as required by law, sustained the allegations of the section 300 petitions, found that ICWA did not apply, removed the children from parental custody, and ordered family reunification services with weekly supervised visits.

In a six-month status review report filed on February 23, 2018, CFS reported that the children were placed in two separate foster homes, with the twins placed together in a "concurrent planning home," and the three older children in a placement that was capable of taking all three of them "pending the location of a concurrent planning home." CFS recommended terminating family reunification services, reducing visitation to monthly supervised visits, and setting a section 366.26 hearing.

The report stated that mother had not been not in touch with CFS from August 11, 2017 to December 8, 2017; during this period, she did not call, visit with the children, or engage in family reunification services.[6] On December 8, 2017, she contacted the social worker and "inquired about her case plan and [the] children's well-being." Mother was on probation pursuant to a plea bargain following her July 2017 arrest for robbery. Nevertheless, she had been in Tennessee, where she had relatives and where she was able to get full time employment with a "major national retailer." She stated that she returned

[6] Father's whereabouts remained unknown; he had not been in touch with CFS since August 3, 2017.

after her probation period with her employer was over, allowing her to transfer to a California location. She was aware that being out of state might violate the terms of her probation on the criminal charge, but felt that "the risk was appropriate as she knew she needed to be able to support her children and the job was more readily available out of state."

Despite returning to California and resuming some contact with CFS, mother's "current circumstances" remained "not known." Mother informed the social worker that she no longer lived at the address of the paternal grandmother, stating that she was now living in "various locations," but she refused to give the social worker any current address or name any of her cohabitants. The social worker determined that mother's probation officer also had not been given any updated address information. On multiple occasions, mother claimed that she would be starting work through a transfer from her Tennessee employer "'any day now,'" but she never provided proof of employment. She claimed to be participating in her case plan, but the service providers all denied any contact from her or participation by her. She claimed that she was no longer using marijuana, but she refused to submit to drug testing.

Mother began visiting with the children in January 2018, but the visits did not go well. Out of a total of seven weekly visits, mother "was a no show no call" four times, though on three of those occasions some visitation occurred after mother showed up more than 30 minutes late because the foster parents had opted to stay so the siblings could visit with one another. Mother's behavior with the children was often inappropriate: "Despite repeated instructions and multiple signed visitation agreements," she was

"unable to have any visits that follow basic rules." The visits were "fraught with extreme emotional behavior, conflict, and lack of willingness to take any direction." All of the visits had to be supervised by two social workers and often one or two of the foster parents, and on one occasion "three security personnel were needed to escort the mother and children separately when the visit was ended early due to the mother's behavior." Mother's behavior showed "little to no improvement" over the course of the seven visits; the seventh "was described as the best one yet, even if both social workers almost ended the visits early due to her comments."

During the visits, mother focused her attention "almost exclusively" on the oldest child, "often while holding but not engaging the twins . . . ." And that attention to the oldest child was often harmful, including inappropriate comments about the dependency and encouraging the child to engage in negative behavior. CFS reported that mother "does not appear to have a strong bond with or interest in any of her children other than [the oldest] and this bond appears to be detrimental . . . ." Mother "held the twins and fed them" for short periods of time, but "made little eye contact and did not check them for a diaper change or needs." She "seemed to prefer the foster parents care for" the twins, and referred to the twins' foster parents as their "'mommy and daddy,' saying 'here you are, go back to mommy' or 'here's your daddy' when returning the children to them."

After a continuance at CFS's request to complete noticing to father, the six-month review hearing was held on April 9, 2018.[7] The parents were not present. The juvenile

[7] On March 21, 2018, mother was sent notice of the continued hearing by mail at her last known address, that of the paternal grandmother.

court adopted CFS's proposed findings and orders, including terminating family reunification services for both parents, ordering monthly supervised visitation, and setting a section 366.26 hearing for August 7, 2018. The juvenile court also granted a petition for de facto parent status filed by the twins' foster parents. It further ordered that the parents "be mailed their writ rights by first-class mail at their last known address."

On April 10, 2018, the juvenile court clerk served mother with notice of her right to writ review of orders setting a section 366.26 hearing, by mail to mother's last known address, at the paternal grandmother's home.

On April 11, 2018, CFS served mother with notice of the section 366.26 hearing through substituted service and follow-up mail service at a jail in San Bernardino County.

On June 19, 2018, the juvenile court received a letter from mother, dated June 12, 2018, sent from the prison in Chowchilla, California. The letter stated that mother had been incarcerated since March 1, 2018, elaborating that she had recently accepted a plea deal for violating her probation and that she had been sentenced to prison. She was "unsure" of her release date. She acknowledged that she was aware of the section 366.26 hearing set for August 7, 2018, expressed her desire to attend to oppose termination of her parental rights, and requested in a postscript a "transportation order for me to be transported to court from here on August 7, 2018." A deputy clerk of the juvenile court, however, responded by letter that the correspondence was being returned "unread" as an "inappropriate" ex parte communication. The deputy clerk's letter also states that "the Court has directed the Deputy Clerk to provide a copy [of mother's letter] to all counsel . . . and return a copy of the correspondence to you."

On August 7, 2018, the section 366.26 hearing was continued until December 5, 2018, at the request of CFS.

In an addendum report filed December 4, 2018, CFS recommended termination of parental rights regarding the twins, requesting an additional 120-day continuance of the section 366.26 hearing with respect to the other three children. The report notes that mother "continues to be incarcerated." The twins were thriving in the home of the de facto parents, with whom they had been placed for more than a year.

On December 5, 2018, the juvenile court granted CFS's request for a continuance regarding the three older children, and proceeded with the section 366.26 hearing for the twins. Neither parent was present for the hearing. The juvenile court found the twins both generally and specifically adoptable, found no evidence of any exception to the preference for adoption, and terminated parental rights.

II. DISCUSSION

A. *Reunification Services*

Mother argues that the juvenile court failed to properly advise her of her writ rights after terminating her reunification services and setting the section 366.26 hearing. If mother was not adequately advised of her writ rights, she would be free to assert error regarding the termination of her family reunification services at the six-month review hearing in April 2018; if she was adequately advised, she would have forfeited such arguments by failing to seek writ review. (See § 366.26, subd. (*l*)(1) & (2); *In re Frank R.* (2011) 192 Cal.App.4th 532, 539 ["The juvenile court did not duly advise father of his writ rights, with the result he is entitled to challenge the merits of the setting order on

appeal from the termination order."]; *In re Maria S.* (2000) 82 Cal.App.4th 1032, 1038 [claims of error regarding reunification services cognizable on appeal from order terminating parental rights because court failed to advise mother of her writ rights].)

In the interest of judicial economy, we decline to consider the parties' arguments regarding whether mother received adequate notice of her writ rights, or whether the issue would have been forfeited even if she had timely sought writ review. (See *In re Elijah V.* (2005) 127 Cal.App.4th 576, 582 ["A parent's failure to raise an issue in the juvenile court prevents him or her from presenting the issue to the appellate court."] We instead consider on the merits mother's claim that she was not provided with reasonable reunification services. We find no error in the juvenile court's determination that CFS offered mother reasonable family reunification services.

"'Reunification services implement "the law's strong preference for maintaining the family relationships if at all possible."' [Citation.] Therefore, reasonable reunification services must be offered to a parent." (*Christopher D. v. Superior Court* (2012) 210 Cal.App.4th 60, 69.) The agency "must make a good faith effort to develop and implement reasonable services responsive to the unique needs of each family . . . in spite of difficulties in doing so or the prospects of success." (*Ibid.*) "The adequacy of the reunification plan and of the agency's efforts to provide suitable services is judged according to the circumstances of the particular case." (*Ibid.*) We review the juvenile court's order with regard to the sufficiency of reunification services under the substantial

evidence standard. (*In re P.A.* (2006) 144 Cal.App. 4th 1339, 1344.)[8] We resolve all conflicts in support of the juvenile court's determination, examine the record in a light most favorable to the juvenile court's findings and conclusions, and indulge all legitimate inferences to uphold the court's order. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1379.)

Mother contends that the reunification services she was provided were unreasonable in only one respect, namely, CFS did not provide her visitation with the children after March 1, 2018, when she was incarcerated. There is nothing in the record, however, supporting the conclusion that the lack of visitation during her incarceration was the result of CFS's "refusal to provide the children and [mother] with those visits," or that CFS "failed to provide the juvenile court with information that she was incarcerated," as mother would have it. It is undisputed that mother voluntarily made herself absent from the children's lives from August to December 2017, travelling to Tennessee in violation of her probation. When she returned, CFS made the children available to her for weekly visitation. Mother chose not to contact CFS to request new arrangements to allow her to continue visitation after her incarceration. As best can be determined from the record, CFS was not aware, and there was no reason it should have

[8] Some courts have applied the abuse of discretion standard of review to a juvenile court's order regarding reunification services. (See, e.g., *In re Angelique C.* (2003) 113 Cal.App.4th 509, 523-524.) We apply the substantial evidence standard of review, but would reach the same conclusions under the abuse of discretion standard.

known, that mother was incarcerated before mother's reunification services were terminated.[9]

"'Reunification services are voluntary . . . and an unwilling or indifferent parent cannot be forced to comply with them.'" (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1365.) Reunification services are not inadequate simply because the parent is unwilling or indifferent. (*In re Jonathan R.* (1989) 211 Cal.App.3d 1214, 1220; see also *In re Michael S.* (1987) 188 Cal.App.3d 1448, 1463, fn. 5 [social worker is not required to "take the parent by the hand and escort him or her to and through" services].) Here, substantial evidence supports the conclusion that mother's own unwillingness or indifference to participating in reunification services, including visitation, and not any failure by CFS, is responsible for her lack of visitation while incarcerated.[10] The juvenile court did not err by finding that the reunification services CFS made available to mother were reasonable, even though she chose not to avail herself of them.

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[9] On April 11, 2018, CFS served mother notice of the section 366.26 hearing via substituted service at the jail where she was then located. But there is no indication that CFS learned mother was incarcerated before the April 9, 2018, hearing, when mother's reunification services were terminated.

[10] We do not here decide whether CFS would have been obliged to comply with a request by mother to provide visitation while incarcerated. It is possible that the circumstances of her incarceration would have made such visitation unreasonable to implement. The point here is that mother did not even inform CFS that she was incarcerated, so CFS cannot be faulted for failing to provide her visitation during her incarceration.

B. *Right to Counsel at Initial Detention Hearing*

Mother argues that the trial court erred by failing to provide her with appointed counsel at the initial detention hearing. We disagree.

Indigent parents have a statutory right to counsel in juvenile dependency proceedings, and a due process right to appointment of counsel under some circumstances. (§ 317; *In re J.P.* (2017) 15 Cal.App.5th 789, 796; *Lassiter v. Dep't of Social Services* (1981) 452 U.S. 18, 31-32.) However, when an indigent parent does not appear and request counsel at a proceeding and does not otherwise communicate a desire for representation, the court is under no duty to appoint counsel to represent that parent. (*In re Ebony W.*) (1996) 47 Cal.App.4th 1643, 1645, 1647-1649.)

The parties dispute whether mother's contact with the court officer during the hearing on July 27, 2017, constituted a telephonic appearance. However, we need not resolve this dispute. As of the hearing on July 27, 2017, the children had not yet been detained even temporarily out of the care of their parents, and CFS was not recommending that they be placed in out-of-home care. Moreover, there is no evidence that mother expressed during the telephone call the desire to have counsel appointed for her. Mother therefore did not yet have a statutory right to appointed counsel. (See § 317, subds. (a)(1) & (b) [providing for appointment of counsel when indigent parent "desires counsel" and "the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care"]; see also § 316 [requiring notice to a parent of right to counsel "[u]pon his or her appearance before the court at the

detention hearing," when child has been "taken into [temporary] custody" in advance of detention hearing].)

Mother likely did have a statutory right to counsel as of the July 31, 2017, hearing. Minors' counsel was requesting that the children be removed, and CFS at least did not oppose that request, even though it did not expressly join in it. But mother did not appear for the hearing, and did not otherwise communicate that she desired appointment of counsel. The juvenile court therefore did not err by failing to appoint counsel for her at that hearing. (*In re Ebony W., supra*, 47 Cal.App.4th at pp. 1645, 1647-1649.)

C. *Transportation Order*

Mother contends that the juvenile court was statutorily obliged to issue a transportation order so that she could be physically present at the section 366.26 hearing, even though she was incarcerated. She contends that this failure was prejudicial because if she had been at the hearing, she could have and likely would have requested and been appointed counsel, who could have obtained for her a more favorable result. CFS concedes that the juvenile court should have issued a transportation order, and that the issuance of such an order likely would have led to appointment of counsel, but argues that the error was harmless. We agree with CFS that the juvenile court's error was not prejudicial.

"[W]hen a parent is incarcerated, no proceeding seeking to terminate parental rights may be held without the physical presence of the incarcerated parent or the parent's attorney, unless the parent gives the court a written waiver of the right to be present. If there is no written waiver, the court must order the parent to be transported to the

hearing." (*In re J. I.* (2003) 108 Cal.App.4th 903, 912-913; see Pen. Code, § 2625, subds. (d), (e).) We review failure to comply with Penal Code section 2625 for harmless error and reverse only if the error resulted in a miscarriage of justice, that is, if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.[11] (Cal. Const., art. VI, § 13; *In re Jesusa V.* (2004) 32 Cal.4th 588, 624-625 [applying harmless-error test articulated in *People v. Watson*, *supra*, 46 Cal.2d at p. 836 to failure to comply with Penal Code section 2625].)

CFS has not disputed that the juvenile court erred by holding the section 366.26 hearing for the twins without the physical presence of mother or her attorney, and in the absence of a written waiver. Apparently, the juvenile court and the attorneys present for the hearing, representing CFS and the minors, did not notice that mother was incarcerated, even though this was mentioned in the section 366.26 report submitted by CFS. CFS also has not disputed that if mother had been present, she likely would have requested appointment of counsel and the request would likely have been granted.

Nevertheless, it is not reasonably likely either mother's physical presence at the hearing or the presence of appointed counsel would have made any difference to the

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[11] A similar harmless error analysis applies if the failure to order mother transported to the section 366.26 hearing is construed as a denial of her right to counsel. Whether a due process right to counsel existed depends on whether the presence of counsel would have made a "'determinative difference'" in the outcome of the proceeding. (*In re Ronald R.* (1995) 37 Cal.App.4th 1186, 1196-1197.) The violation of a parent's statutory right to counsel is harmless unless it is "'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*In re Ronald R.*, *supra*, at p. 1195, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.)

result of the section 366.26 hearing. As discussed above, mother had failed to comply with her reunification plan in virtually every respect, except for attending visitation seven times in January and February 2018, and those visits did not go well. Mother did not appear to be strongly bonded with the twins, who were thriving in the home of their de facto parents, with whom they had been placed for the majority of their lives. During the relatively short time of the dependency, mother had been arrested for robbery, released on probation pursuant to a plea bargain, then incarcerated again for violating her probation. Mother had previously failed to reunify with two older half siblings of the children at issue in these dependency proceedings. Although, as mother points out in briefing, there are arguments that appointed counsel conceivably could have raised on mother's behalf at the section 366.26 hearing, we find it highly unlikely that that any of these arguments would have been successful in obtaining a more favorable result.

We conclude mother has not demonstrated a reasonable probability that the juvenile court's orders at the section 366.26 hearing would have been any different if she had been present and/or represented by counsel, so the trial court's failure to comply with Penal Code section 2625, subdivisions (d) and (e), was harmless.

D. *ICWA*

Mother argues, and CFS concedes, that CFS did not adequately document its inquiry into whether the children might have Native American heritage before the juvenile court found that ICWA did not apply. The jurisdiction/disposition report, filed on August 16, 2017, stated that ICWA did not apply, but did not include evidence in support of that conclusion. We find, and the parties agree, that in this circumstance the

appropriate remedy is a conditional reversal to ensure that ICWA requirements are met. (See *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1168.)

III. DISPOSITION

The order terminating parental rights as to B.M. and I.M. is conditionally reversed. The matter is remanded to the juvenile court with directions to order CFS to comply with the inquiry and notice provisions of ICWA and sections 224.2 and 224.3, and to submit evidence documenting compliance with those statutes. If, after receiving notice as required by those statutes, the relevant tribes, if any, do not respond or respond that the children are not Indian children within the meaning of ICWA, the order terminating parental rights shall immediately be reinstated and further proceedings shall be conducted, as appropriate. If any tribe determines that the children are Indian children, the juvenile court shall proceed accordingly. In all other respects, the orders are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

RAMIREZ
P. J.

MENETREZ
J.